SUPREME COURT, U. S.

FILED

MAR 7. 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1208

SAFEGUARD MUTUAL INSURANCE COMPANY, an Insurance Corporation of the State of Pennsylvania,

Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, a Body Corporate and Politic of the State of New Jersey and B. SMITH ELECTRIC COMPANY, INC., a Corporation.

Appeal From the Judgment of the Superior Court of New Jersey, Appellate Division.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

SAFEGUARD MUTUAL INSURANCE COMPANY, AN INSURANCE CORPORATION OF THE STATE OF PENNSYLVANIA,
Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, A BODY CORPORATE AND POLITIC OF THE STATE OF NEW JERSEY AND B. SMITH ELECTRIC COMPANY, INC., A CORPORATION.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

JURISDICTIONAL STATEMENT.

Appellant, Safeguard Mutual Insurance Company, Inc., an insurance corporation of the State of Pennsylvania, appeals for this Court to review the judgment of the Superior Court of New Jersey, Appellate Division, and the Order denying its Petition for Certification to the Supreme Court of New Jersey denying appellant's appeal.

CITATIONS TO OPINIONS BELOW.

The judgment of the Law Division of the Superior Court of New Jersey, Camden County, is unreported and is printed in Appendix C, *infra* p. 18. The Order of the Superior Court of New Jersey, Appellate Division is printed in Appendix F, p. 29, *infra*. The Order of the Supreme Court of New Jersey denying appellant's Petition for Certification is printed in Appendix G, p. 30, *infra*.

JURISDICTION.

The judgment of the Superior Court of New Jersey, Law Division, Camden County, was entered on January 20, 1967. Subsequently, an appeal was taken to the Superior Court of New Jersey, Appellate Division, and refused on October 16, 1967. Subsequently, a Petition for Certification to the Supreme Court of New Jersey was filed therein and an Order denying said Petition for Certification was entered on December 12, 1967, by the Supreme Court of New Jersey.

On February 29, 1968 Notice of Appeal was filed with the Superior Court of New Jersey, Appellate Division. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2) (Appendix H, p. 31, *infra*).

QUESTION PRESENTED.

1. Where Safeguard Mutual Insurance Company, appellant, a Pennsylvania domestic fire insurance company, licensed to do business in Pennsylvania, and not authorized to do business or licensed to do business in New Jersey, issued to B. Smith Electric Company, a resident Pennsylvania corporation, a Bid and Performance Payment Bond in Pennsylvania on a certain building project then contemplated by the Housing Authority of the City of Camden, appellee, in Camden, where the bid by the Electric Company was rejected by the Housing Authority because the bond did not include the New Jersey statutory requirement for an affirmative undertaking to pay the lawful claims of sub-contractors, laborers, material men and suppliers on the project, and when the project was bid a second time, the low bid was $15,670 higher than the Smith award had been, and the Authority proceeded with the project and filed suit in the Law Division, Camden County, of the Superior Court of New Jersey, against both Smith and Safeguard, seeking to recover the above sum, and at the trial in the Law Division of the Superior Court of New Jersey, Camden County, Smith defaulted and Safeguard, having moved to dismiss the action for lack of jurisdiction because of invalid service on the Commissioner of Banking and Insurance under the New Jersey statute (Title 17, N. J. S. A. §§ 51-1, et al.) providing, inter alia, that the issuance or delivery of contracts of insurance to residents of New Jersey or corporations authorized to do business therein, by an insurer not authorized to transact business in New Jersey, as Safeguard was not, constituted the New Jersey Commissioner of Banking and Insurance their attorney for service of process, and where service in fact was made on the New Jersey Commissioner of Banking and Insurance, where the contract of insurance (Bid and Performance Payment Bond) was issued to Smith Electric

Company, a Pennsylvania Corporation, in Pennsylvania at Safeguard's premises in Pennsylvania, and no transaction took place in New Jersey between Smith and Safeguard, and where Safeguard transacted no other business in New Jersey, and at the trial Safeguard introduced no testimony in its own defense, but preserved its motion to dismiss the Complaint on the grounds that service under the New Jersey statute was invalid under the circumstances herein and the Court lacked jurisdiction, and the trial court ruled there was no issue of fact to be resolved by the jury and then entered judgment against Safeguard for $11,000, the face amount of its bid bond, plus costs, which judgment was affirmed by the Superior Court of New Jersey, Appellate Division, which judgment was affirmed by the Supreme Court of New Jersey by denial of Safeguard's Petition for Certification, where the question of the trial court's lack of jurisdiction because of invalid service under the New Jersey statute was preserved on appeal, was it error for the trial court as affirmed on appeal to the Superior Court as affirmed by the denial by the New Jersey Supreme Court of Safeguard's Petition for Certification, to deny Safeguard's Motion to Dismiss for lack of jurisdiction based on the claim of invalid service on the New Jersey Commissioner of Banking and Insurance based on the New Jersey statute providing for such service as applied to Safeguard herein because the application of the New Jersey statute under these circumstances offended Section 1 of the XIV Amendment to the United States Constitution.

STATUTES INVOLVED.

The statutory provision involved is the New Jersey Constructive Service Act, N. J. S. A. 17: 51-1, subsection (a); the Due Process Clause of the United States Constitution, Amendment XIV, Section 1. They are printed in Appendices I and J, *infra*, pp. 32 and 38.

STATEMENT.

On June 18, 1964, the appellant, Safeguard Mutual Insurance Company, a Pennsylvania Domestic Mutual Fire Insurance Company situated in Pennsylvania, issued to B. Smith Electric Company, Inc., a Pennsylvania corporation, in Pennsylvania a certain bid bond in the penal sum of $11,000.00 to secure a bid which Smith subsequently submitted on a certain building project then contemplated by the Housing Authority of the City of Camden. The bid bond by its terms specifically undertook to secure only that Smith, if the successful bidder, would enter into a written contract for the work bid with the Authority and give a bond for the faithful performance and proper fulfillment thereof.

Upon the opening of the bids on the project in question, it was ascertained that Smith was the lowest responsible bidder, and the Authority awarded the contract to Smith and presented it with a form of contract to execute and return to the Authority. On July 15, 1964, Safeguard issued in Pennsylvania its Performance Payment Bond to Smith, in Pennsylvania, wherein it bound itself as surety to the Authority for the faithful performance and proper fulfillment by Smith of the obligations of its building contract with the Authority.

Smith then presented to the Authority the form of contract provided for the project duly executed on its behalf and the "Performance Payment Bond" that Safeguard had issued in Pennsylvania with respect to this project. The Authority, however, refused to execute the said contract and declined to accept the Safeguard "Performance Payment Bond" on the grounds that the form of said bond was not as had been set forth in the building contract specifications. The departure referred to by the Authority was

the fact that the Safeguard bond did not specifically include an affirmative undertaking to pay the lawful claims of subcontractors, laborers, material men and suppliers on the contract.

The Authority argued that it was required under the New Jersey Statutes to demand a bond in the form as set forth therein and demanded that Safeguard issue such a bond to Smith. Safeguard declined to do so and Smith did not procure the requested form of bond elsewhere, as a result of which the Authority rescinded the award of said contract to Smith and readvertised the project for bids.

When the project was bid a second time, the low bid was $15,670.00 higher than the Smith award had been. The Authority proceeded with the project and filed suit in the Law Division against both Smith and Safeguard seeking to recover the above sum. At the trial below, the then defendant, Smith, defaulted. Safeguard introduced a Motion to Dismiss the action on the grounds of invalid service and lack of jurisdiction in the court below under R. S. N. J. 17:51-1 subsection (a). This Motion was denied prior to trial, and Safeguard introduced no testimony in its own defense at trial. The trial court ruled that there were no issues of fact to be resolved by the jury and then entered judgment against Safeguard for $11,000.00, the face amount of its bid bond, plus costs, on the theory that Safeguard in its bid bond obligated itself to guarantee procurement of a Payment and Performance Bond in the form prescribed by the New Jersey Statutes, which it found Safeguard failed to do, thus precipitating the rebidding of the project at a loss to the Authority in excess of $11,000.00. This judgment appellant appealed to the Appellate Division of the Superior Court of New Jersey. In that appeal it argued that the New Jersey Commissioner of Banking and Insurance was not a duly constituted agent of appellant capable of receiving legal process on its behalf, since it had not im-

pliedly designated the Commissioner of Insurance as its authorized agent to accept service of process by merely issuing in Pennsylvania, to a Pennsylvania corporation, a bid bond which the purchasers subsequently transported into New Jersey and submitted as part of a bid on a public project. The Superior Court of New Jersey, Appellate Division, on October 16, 1967, affirmed the judgment of the Law Division of the Superior Court, Camden County. Subsequently, a Petition for Certification to the Supreme Court of New Jersey was filed by appellant and on December 12, 1967, this Petition for Certification was denied with costs by the Supreme Court of New Jersey. Notice of Appeal was then filed on behalf of appellant herein.

STAGES IN THE PROCEEDINGS IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED.

Prior to trial appellant moved for an Order for a summary judgment, or judgment on the pleadings or for an Order dismissing the Complaint on the grounds that appellant had not done any of the acts enumerated in R. S. N. J. 17:51-1 subsection (a) to render said appellant subject to service of process through the Commissioner of Banking and Insurance of the State of New Jersey in the matter by said statute made and provided. On December 23, 1964, this Motion was denied by the Honorable Judge Anthony C. Mitchell, J. C. C., sitting in the Law Division, Camden County, of the Superior Court of New Jersey. This Order and the Affidavit pertinent thereto are set forth in Appendices A and C, pp. 15, 16 and 18-20, *infra*. Subsequently, at the trial, appellant preserved the denial of this motion for summary judgment based on invalid service of process as an appealable interrog Order. The trial court ruled that this matter was not appealable until after the trial court had affixed judgment and the Court stated

that the motion was thereupon preserved. N. T. 113, 114, see Appendix E, p. 27, *infra*.

This question was preserved on appeal to the Superior Court of New Jersey, Appellate Division. In its questions presented No. 4 appellant stated: "Has this foreign surety impliedly designated the Commissioner of Insurance as its authorized agent to accept service of process by merely issuing in Pennsylvania, to a Pennsylvania Corporation, a bid bond which the purchaser subsequently transported into New Jersey and submitted as part of a bid on a public project." Brief for appellant pp. 1 and 2. See certification of Record from Superior Court. This question is then presented on page 14 of the Brief as point 3 therein. See certification of Record from Superior Court.

The Superior Court of New Jersey, Appellate Division denied appellant's appeal on October 16, 1967. In its per Curiam opinion the Court stated: "We have examined the Court's decision on plaintiff's motion for judgment and are in agreement with such decision. Accordingly, the judgment is affirmed." See certification of Record from Superior Court.

Appellant again raised the question of invalid service under the New Jersey statute in point 3 in its Petition for Certification to the Supreme Court of New Jersey. See point 3 of appellant's Petition for Certification. See certification of Record from Superior Court. The Petition for Certification was denied by the Supreme Court of New Jersey on December 12, 1967.

PRESENTATION OF THE GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL.

1. This appeal is predicated upon the contention that as applied to the facts of this case the New Jersey statute

providing for constructive service is contrary to Section 1 of the Fourteenth Amendment to the United States Constitution. At the trial of this case the appellant preserved its prior motion for summary judgment and a dismissal of the Complaint on the ground that the statute was invalid as applied. This question was also preserved on appeal. In accordance with the doctrine of *Hanson v. Denckla,* 357 U. S. 235 (1958), a substantial federal question of jurisdiction has been presented. Thus jurisdiction is conferred upon this court under 28 U. S. C. Section 1257(2), according to the doctrine of *Hanson v. Denckla, supra.*

The appellant here was a foreign insurance corporation, organized as a domestic mutual fire insurance corporation in Pennsylvania, not authorized to do business in the State of New Jersey, which issued the surety bonds in question in Pennsylvania to a resident of Pennsylvania. No basis existed under R. S. N. J. 17:51-1, S. subsection (a) to justify the designation of the New Jersey Commissioner of Banking and Insurance as appellant's agent to receive service of process. Appellant contended throughout the proceedings beginning with its pretrial motion for summary judgment and dismissal of the Complaint which was preserved at the time of trial and on appeal to the Appellate Division of the Superior Court of New Jersey that the Court never obtained proper jurisdiction over it and was not empowered to make an adjudication as to its liability. Under these factual circumstances the New Jersey statute providing for such constructive service was invalid under Section 1 of the Fourteenth Amendment to the United States Constitution. See Appendix B, *infra* for the full text of the New Jersey Statute and Section 1 of the Fourteenth Amendment.

Statutes providing for constructive service on out of state insurance companies have been sustained as valid on

the theory that by engaging in local business the foreign insurance company can consent to be sued in the local courts. Couch on Insurance 2d, § 21:81; *Lafayette Ins. Co. v. French,* 18 How. 404, 15 L. ed. 451; *Ex parte Schollenberger,* 96 U. S. 369, 24 L. ed. 853.

Under the statutes relating to service of process upon foreign insurers doing business within a state, the business must generally be more than isolated acts, and must be of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which, for instance, it is served, and in which it is bound to appear when a proper agent has been served with process. Couch on Insurance, 2d Section 21:49.

Insuring property in one state, when the application is received at, and the policy is issued from, the home office in another state, does not constitute doing business within the state in which the property is located. *Hussey Tie Co. v. Knickerbocker Ins. Co.,* (CA Mo.) 20 F. 2d 892, cert. den. 275 U. S. 569, 72 L. ed. 431, 48 S. Ct. 141; *Palmetto F. Ins. Co. v. Beha* (DCNY) 13 F. 2d 500.

As applied here, the New Jersey statute should have been declared invalid as offensive to Section 1 of the Fourteenth Amendment to the United States Constitution. The New Jersey statute R. S. N. J. 17: 51-1 subsection A provides as follows:

> "Any of the following acts in this State, by an insurer not authorized to transact business in this State: (1) the issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other

transaction of business in relation to such contracts of insurance, is equivalent to and shall constitute an appointment by such insurer of the Commissioner of Banking and Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process and a complaint in any action or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process and a complaint is of the same legal force and validity as personal service of the same legal force and validity as personal service of the same in this State upon such insurer."

The facts in this case reveal that appellant in Pennsylvania issued a bid and performance bond to B. Smith Electric Company, a Pennsylvania corporation to its agent in Pennsylvania and at no time performed any acts or conducted any business in the State of New Jersey. The act itself stipulates that the actions must take place in the State of New Jersey and that there must be involved the issuance or delivery of contracts of insurance to residents of New Jersey or corporations authorized to do business therein in New Jersey R. S. N. J. 17:51-1(a). The record clearly reveals that such was not the case here.

In the instant case the Housing Authority of the City of Camden, appellee, obtained service upon the appellant by serving the New Jersey Commissioner of Banking and Insurance under the New Jersey statute. This service was held to be valid under the New Jersey statute by the trial court and the Superior Court of New Jersey, Appellate Division, whose judgment was affirmed by the denial of appellant's Petition for Certification by the Supreme Court of New Jersey. This in effect sustained the validity of the

New Jersey statute which appellant now contends as applied was offensive to Section 1 of the Fourteenth Amendment to the United States Constitution.

Under these circumstances, it is clear that there is an absence of affiliating circumstances "Without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction in persona) or affecting interests in property (jurisdiction in rem or quasi in rem). *Hanson v. Denckla, supra.* As in *Hanson v. Denckla, supra* the jurisdiction in this case is not such as arises out of an act done or transaction consummated in the forum State.

In *McGee v. International Life Insurance Company,* 355 U. S. 220, jurisdiction was obtained by statutory service on a non-resident insurance company and held valid. In the *McGee* case the contract was delivered in California, the premiums were mailed from there, and the insured was a resident of that State when he died. Mr. Justice Black held that California had a manifest interest in providing effective means of redress for its residents when their insurers refused to pay claims.

As Chief Justice Warren points out in *Hanson v. Denckla, supra,* this case is different from *McGee* where the non-resident defendant solicited a reinsurance agreement with a resident of California. In *McGee, supra* the court upheld jurisdiction because the suit was based on a contract which had substantial involvement with the State in which service was obtained.

In the instant case there was absolutely no contact by appellant with the State of New Jersey in terms of its dealings with appellee, B. Smith Electric Company, a Pennsylvania corporation, in Pennsylvania.

Under these circumstances, a substantial federal question has been presented as to the validity of the constructive service provided for by the New Jersey statute upon a

foreign corporation not authorized to do business in New Jersey whose only contact is to issue a contract of insurance, namely a bid and performance bond, to a Pennsylvania corporation, in Pennsylvania, where such Pennsylvania corporation happens to be authorized to do business in New Jersey. The tenuity of such connection with the State of New Jersey does not establish a valid basis for the constructive services of process provided for by the New Jersey statute and thus deprives appellant of its property rights without due process of law under Section 1 of the Fourteenth Amendment to the United States Constitution.

Appended to this jurisdictional statement in Appendices C, D, E, F and G, *infra* are copies of the orders, Judgments and Decrees appealed from in the State Courts of New Jersey, along with the opinions pertinent thereto. See pp. 18, 21, 24, 29 and 30.

CONCLUSION.

For the foregoing reasons, this appeal should be granted.

Respectfully submitted,

MALCOLM W. BERKOWITZ,
SIDNEY W. BOOKBINDER,
Counsel for Appellant.

APPENDIX A.

Affidavit of Leopold Weiner on First Count.

No. 1-1877-64

First Count.

Commonwealth of Pennsylvania
County of Philadelphia } ss.:

Leopold Weiner, being duly sworn according to law deposes and says that he is Secretary of Safeguard Mutual Insurance Company formerly known as Safeguard Mutual Fire Insurance Company, that the said company is a Pennsylvania Corporation duly constituted to engage in the insurance business, that the company's home office is 342-44 North Broad Street, Philadelphia, Pennsylvania, and that it has no other offices or places for the conducting of its business within or without the Commonwealth of Pennsylvania and that it has no place of business, or agent, in the State of New Jersey, that it has not authorized the State of New Jersey Department of Banking and Insurance nor any other division or subdivision of the State of New Jersey, to accept service of process on its behalf, that it is not doing business within the State of New Jersey, that the acts complained of by the plaintiff in its Complaint all occurred within the State of Pennsylvania, and no act of the defendant occurred within the State of New Jersey, and that the defendant is not subject to Chapter 320 of the Laws of 1962 of the State of New Jersey, nor is it subject to

any other Laws of the State of New Jersey which would grant your Honorable Court jurisdiction over the defendant, and further, there is no Federal Law or Rule of Civil Proceedings, which could be applied in the instant matter to grant your Honorable Court jurisdiction over the defendant. The bond upon which the plaintiff's suit is based, was issued by the defendant, at its home office at 342-44 North Broad Street, Philadelphia, Pennsylvania, and delivered to Bud Smith, who resides in Pennsylvania and who is employed by B. Smith Electric Company, Inc., a Pennsylvania corporation. The defendant had no knowledge that the said bond would be delivered or used outside of Pennsylvania.

/s/ LEOPOLD WEINER,
Leopold Weiner.

Sworn and subscribed before me this 24th Day of November, 1964.

/s/ MELVIN WEINER,
Notary Public.
Philadelphia, Phila. Co., Pa.
My commission expires April 8, 1968.

APPENDIX B.

Affidavit of Leopold Weiner on Second Count.

No. L-1877-64.

SECOND COUNT.

LEOPOLD WEINER, being duly sworn according to law deposes and says that he is Secretary of Safeguard Mutual Insurance Company formerly known as Safeguard Mutual Fire Insurance Company, that the said company is a Pennsylvania Corporation duly constituted to engage in the insurance business, that the company's home office is 342-44 North Broad Street, Philadelphia, Pennsylvania, and that as of June 30, 1964, Safeguard Mutual Insurance Company had admitted assets of $881,601.99 and liabilities of $356,060.88, making its net assets the sum of $525,541.01, which sum is more than sufficient to satisfy any judgment that could be entered against it in this matter.

/s/ LEOPOLD WEINER.
Leopold Weiner.

Sworn and subscribed: before me this 30th day of November, 1965.

/s/ MELVIN WEINER,
Notary Public.
Philadelphia, Phila. Co., Pa.
My Commission expires April 8, 1968.

APPENDIX C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION.
Camden County.

Docket No. L 1877-64.

CIVIL ACTION.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, A BODY CORPORATE AND POLITIC OF THE STATE OF NEW JERSEY,

Plaintiff,

v.

B. SMITH ELECTRIC CO., INC., A CORPORATION, AND SAFEGUARD MUTUAL INSURANCE CO., A CORPORATION, JOINTLY, SEVERALLY, AND IN THE ALTERNATIVE,

Defendants.

ON MOTION OF DEFENDANT SAFEGUARD MUTUAL INSURANCE COMPANY FOR SUMMARY JUDGMENT OR FOR AN ORDER DISPENSING WITH REQUIREMENT FOR DEPOSIT OF SECURITY.

Order.

The above matter coming on to be heard in the presence of Martin F. McKernan, Esquire, attorney for the plaintiff, and Anthony M. Bezich, Esquire, of Supnick and Bezich, Esquires, attorneys for defendant, Safeguard Mutual In-

surance Company, on a motion made by the said defendant for an order for Summary Judgment, or Judgment on the Pleadings, or for an order dismissing the Complaint on the grounds that said defendant has not done any of the acts enumerated in subsection (a) of R. S. N. J. 17:51-1 to render said defendant subject to service of process through the Commissioner of Banking and Insurance of the State of New Jersey in the manner by said statute made and provided, or in the alternative for an order dispensing with the requirement of said statute that said defendant deposit with the clerk of this court cash or securities or bond with good and sufficient sureties to secure the payment of any final judgment which may be rendered in this action, and the Court having read and considered the affidavits herein filed, and having heard and considered the arguments of counsel for the respective parties, it is on this 23rd day of December, 1964;

ORDERED that the motion of said defendant Safeguard Mutual Insurance Company for summary judgment, or judgment on the pleadings, or for an order dismissing the complaint, be and the same is hereby denied, and it is further

ORDERED that the motion of said defendant, Safeguard Mutual Insurance Company for an order dispensing with the requirement that said defendant deposit with the clerk of this court cash or securities or a bond with good and sufficient sureties in an amount sufficient to secure the payment of any final judgment which may be rendered in this action be and the same is hereby denied, and it is further

ORDERED that said defendant, Safeguard Mutual Insurance Company shall, before filing its answer as hereinafter provided, deposit with the clerk of this court the sum of $15,000.00 in cash or securities, or file with said clerk a

bond in the said amount, with good and sufficient sureties, to secure the payment of any final judgment which may be rendered in this action against the said defendant, and it is further

ORDERED that said defendant Safeguard Mutual Insurance Company shall serve and file its Answer to the complaint of the plaintiff herein filed within 30 days of the date hereof.

/s/ ANTHONY C. MITCHELL,
J. C. C.
T. A.

Entry of the above Order is hereby consented to as to form.

SUPNICK AND BEZICH,

By /s/ ANTHONY M. BEZICH,
Attorneys for Defendant Safeguard Mutual Insurance Company.

APPENDIX D.

Pretrial Order.

FIRST COUNT.

1. This is a contract action where the plaintiff seeks to recover on a contractor's surety bond.

2. None.

3. Defendant, Safeguard Mutual Insurance Co., was the corporate surety guaranteeing the bid of deft., B. Smith Electric Co. Inc. Smith offered to perform the electrical work for John F. Kennedy Towers, in the amount of $106,830.00. The Bid Bond accompanying Smith's bid, was in the amount of $11,000.00. Smith's bid was the lowest bid and was accepted by plf. By the terms of the bid, Smith obligated itself to enter into a contract with plf. for the performance of the said electrical work and also obligated itself to furnish, together with its executed contract, a Performance and Payment Bond in the form required by Plf. Smith, after having been awarded the contract, could not procure or produce the necessary Performance and Payment Bond in the form required by the plf., under the contract documents and under the applicable statutes of the State of N. J. for that reason, plf. was obliged to re-advertise for bids for said electrical work and the lowest bid received thereafter was in the amount of $122,500.00, which was accepted by plf., and the contract in that amount was awarded on Sept. 11, 1964. The difference between the bid of deft., Smith, and the amount which plf. was eventually required to pay under the subsequent bid, was $15,670.00. No part of that money was ever recovered from Smith and plf. therefore demands judgment against deft. Safeguard in the amount of its bond or $11,000.00.

4. Defendant, Safeguard Mutual Insurance Co. contends it issued a bid bond accompanying the bid of deft. B. Smith Elc. Co., for electrical work; that Safeguard would issue a Performance Bond as per the terms of the Bid. The Housing Authority awarded the contract to B. Smith with knowledge that the Bid Bond accompanying the Bid was not within the terms of the Bid and specifications, i.e., that the Bid Bond was issued by an Insurance Co. not authorized to do business within the State of N. J. Safeguard issued a Performance and Payment Bond in accordance with the terms of their Bid Bond that accompanied the Bid of B. Smith and tendered same to the Housing Authority on July 16, 1964. The Performance and Payment Bond issued by the deft., Safeguard, guaranteed to the Housing Authority that all labor, material and performance pursuant to contracts executed on July 14, 1964, between the Housing Authority and B. Smith would be done. The Performance and Payment Bond was rejected by the Housing Authority because Safeguard was not authorized to do business in the State of N. J. and the Performance and Payment Bond was not in form prescribed by the specifications. Deft., Safeguard, further contends that the readvertised bid for electrical work was not the same as the original invitation for Bid. The readvertised invitation for Bid included additional requirements from the bidder.

5. The plf. demands damages in the sum of eleven thousand dollars ($11,000.00) together with interest.

6. None.

7. Contract, Breech of contr., damages. Does Judgment obtain against B. Smith preclude action against deft. Safeguard.

8. None.

9. Specifications for the construction of John F. Kennedy Towers, particularly specifications and instruction to bidders.

b—Bid of deft., B. Smith; and

c—Surety Bond of deft., Safeguard.

10. Not applicable.

11. No limitation.

12. Counsel will supply a memorandum to the court at the time of trial.

13. Usual order.

14. None.

15. Martin F. McKernan for the plf.
Anthony M. Bezich for the deft.

16. Two days.

17. To be fixed.

HON. JUDGE WILLIAM E. PEEL, *JDC*.
/s/ WILLIAM F. PEEL.

/s/ MARTIN F. MCKERNAN, ESQ.
/s/ ANTHONY M. BEZICH, ESQ.

APPENDIX E.

Opinion of the Court.

The Court: All right. Now, if I could have those Exhibits, gentlemen, please. I think it best there will be no dispute as to facts. This being the facts presented by the plaintiff in the plaintiff's case, by oral testimony and the several Exhibits which have been marked into evidence, it is not necessary that the Court find any facts. The matter is solely now a legal matter, and insofar as a recital for those facts to be explained, the Court's decision may be in order.

However, it appears that the Housing Authority of the City of Camden have become desirious of constructing a Senior Citizens Housing Project under and by authority of the Federal statute, undertook to have plans and specifications prepared for the same, known as the John F. Kennedy Towers.

As a result of that, a public advertisement was inserted in the Courier Post, a newspaper circulating in the City of Camden, which notice has been introduced into evidence as Exhibit P-2. That notice amounted to an invitation to bid, not only for the electrical work, which we are concerned with, but the various other phases of the construction of this project.

The significant part of that notice is that which directs the interested parties as to where they can find the plans and specifications, and, briefly, what is going to be required of them.

The entire specifications were not published, and they are not required to be published under the law. The reason is quite obvious. The expense would be tremendous. The

specifications, which are P-1 in evidence, are quite a large bound volume, probably as thick as the Philadelphia or Manhattan telephone directory, which is some inch and a half, two inches, thick. Those specifications contain the pertinent data with respect to the manner or method of bidding, which has been testified to.

They set forth the form of the bid bond, they set forth the form of the payment and performance bond.

The form of the performance bond, in dispute here, is the identical form set forth in the statute of New Jersey, to which every public body must adhere to. Substantially, substantially means just what the word implies. Without any big deviation. In addition to that, the plaintiff has the right to specify, as it did, that the exact language shall be in the form of the bond required in this case.

And, certainly, that would be the wisest course in any event.

B. Smith Electric Company undertook to furnish a bid in the amount of a hundred and six thousand eight hundred and thirty dollars for the electrical work, as shown by the Exhibit P-3.

At the same time, it submitted the bid bond, P-4, executed by the plaintiff and the defendant, Safeguard Mutual Insurance Company.

Now, the bid form is a form which was incorporated in the specifications, and, among other things, acknowledges that the bidder has familiarized himself with the form of an ultimate contract to be executed, and the form of payment and performance bond already in dispute. There were six other bidders for the electric work. Smith was the lowest. On June 18, 1964, at a regular meeting of the plaintiff, they accepted the bid of Smith, subject to approval of its counsel and the Public Housing Administration. Counsel approved the bid, and it was then sent to the Publice Housing Administration, and likewise approved.

On or about July 14, B. Smith was notified of the approval. He submitted an executed contract, P-5 in evidence, together with form of bond, P-6.

The bond was not in the statutory form, either verbatim or substantially, and so found as a matter of law neither was it in the form of course of the form required by the specifications because the specifications, as has been said before, required that the exact wordage of the statute be employed.

Thus, at this point, Smith did not comply with his bid, and at this point a default in fact occurred.

From the evidence that it appears that plaintiff gave Smith an opportunity to correct this default by obtaining a bond, the required form, as none was forthcoming, and at a meeting in August, I believe, the record shows that it was August 6, 1964, the award of the contract to Smith was rescinded and the bid of Coffey and Coyle, I think the next lowest responsible bidder, be accepted, subject to the approval of counsel and the Public Housing Administration, as indicated by the Resolution P-8 in evidence.

It appears from the testimony that the Public Housing Administration would not approve the acceptance of that bid because it was excessive, and directed that the Plaintiff re-advertise.

In accordance with that direction, plaintiff did readvertise. The re-advertisement being identical to the first advertisement, P-2, with exceptions that it invited bids only for the electrical work, and the identical same specifications, P-1.

Three bids were received, all lower than the Coffey and Coyle bid, which certainly indicated that the Public Housing Administration acted in good faith, and with knowledge.

You might reflect at this point because they had so ruled for damages as to B. Smith were mitigated because

the two bids came in for a hundred twenty-two thousand five hundred dollars, and a very proper method of selecting the successful bidder was employed, by the drawing of lots, and the contract was then awarded to a company by the name of Meade Electric, and they went on to finish the job.

So that the damages must be measured by the difference between the bid of B. Smith Electric at a hundred six thousand eight hundred thirty dollars and the bid of Meade for a hundred twenty-two thousand five hundred dollars.

However, the damages for which the defendant insurance company is liable cannot exceed the amount of the money, eleven thousand dollars, regardless of their mark, regardless of the actual resulting damage, which would prove to be in excess of the amount which in this case is due.

The defenses raised by the defendant in their pleadings and pre-trial is, the factual defenses, and have failed to materialize, and the legal arguments are without a substance.

The Court finds that the plaintiff acted in the only proper fashion it could. I find there is not the slightest deviation in their contract from the strict regulations of the law, or the specifications, and, B. Smith did not comply, and the failure of B. Smith to comply, and a default resulted which remained unpaid automatically entitled the plantiff to recover from the surety. Plaintiff does not have to show that it has been unable to collect from B. Smith, because collection is not a prerequisite.

In a matter of this sort, judgment will therefore be entered into in the amount of eleven thousand lollars in favor of the plaintiff and against the defendant, Safeguard Mutual Insurance Company, without interest, but with costs.

Is there anything further, gentlemen?

Mr. Bezich: That's it.

The Court: Bring the Jury down. Under the law, gentlemen, the Court must preserve the Exhibits until the time of appeal expires, and at the original appeal they will be preserved until the matter is disposed of on appeal.

(The Jury returns for dismissal.)

APPENDIX F.

Judgment and Mandate on Affirmance.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION.

APPEAL DOCKET NO. A-677-66.

CIVIL ACTION ON APPEAL.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, A BODY CORPORATE AND POLITIC OF THE STATE OF NEW JERSEY,

Plaintiff-Respondent

v.

B. SMITH ELECTRIC CO., INC., A CORPORATION, AND SAFEGUARD MUTUAL INSURANCE CO., AN INSURANCE CORPORATION OF THE STATE OF PENNSYLVANIA,

Defendant-Appellant.

It is hereupon ordered and adjudged that the Judgment of the said Superior Court-Law Division-Camden County is affirmed with ..... costs; and that the record be remitted to the Superior Court - Law Division - Camden County to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division.
Judgment Entered: October 16, 1967
Mandate Issued: October 27, 1967

MORTIMER G. NEWMAN, JR.,
Clerk of the Superior Court.

APPENDIX G.

Order Denying Petition.

SUPREME COURT OF NEW JERSEY

C-79 SEPTEMBER TERM 1967.

ON PETITION FOR CERTIFICATION.

HOUSING AUTHORITY OF THE CITY OF CAMDEN,
Plaintiff-Respondent,

v.

B. SMITH ELECTRIC CO., INC., ET AL.,
Defendants-Petitioners.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 12th day of December, 1967.

A TRUE COPY
JOHN H. GILDEA,
Clerk of the Supreme Court.

APPENDIX H.

Jurisdictional Provision of the United States Code.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX I.

New Jersey Constructive Service Act.

PART 12. UNAUTHORIZED INSURERS

CHAPTER 51

SUBMISSION TO JURISDICTION OF STATE

Sec.

17.51-1. Acts in State by unauthorized insurers which constitute Commissioner attorney for service of process; service.

17:51-2. Actions against unauthorized insurers; deposit or bond required before insurer may file pleading.

17:51-3. Provisions inapplicable, when.

17:51-4. Partial invalidity.

17:51-5. Short title.

17:51-1. Acts in State by unauthorized insurers which constitute Commissioner attorney for service of process; service

(a) Any of the following acts in this State, by an insurer not authorized to transact business in this State: (1) the issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein, (2) the solicitation of application for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other transaction of business in relation to such contracts of insurance, is equivalent to and shall consti-

tute an appointment by such insurer of the Commissioner of Banking and Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process and a complaint in any action or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process and a complaint is of the same legal force and validity as personal service of the same in this State upon such insurer.

(b) Such service of process and a complaint upon the commissioner shall be made by leaving two copies thereof, with the fee prescribed by law, in the hands of the commissioner or someone designated by him in his office, or in the following actions, by serving the same, as follows: (1) If the action is commenced in the County Court of any county other than Mercer county, then the sheriff or other authorized person, or (2) if the action is commenced in the county district court of any county other than Mercer county, then the clerk of the court may serve the commissioner by mailing such papers to him by registered mail, with the said fee. The commissioner shall forthwith mail by registered mail one of the copies of such process and complaint to the defendant at its last-known principal place of business, and shall keep a record of all papers so served upon him. The commissioner, upon giving notice to the defendant of the service of process as required by this act, shall file with the clerk of the court his certificate of the notice given. Such service of process and a complaint is sufficient, provided notice of such service and a copy of the papers are sent within ten days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last-known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is

registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(c) Service of process and a complaint in any such action or proceeding shall in addition to the manner provided in subsection (b) of this section be valid if served upon any person within this State who, in this State on behalf of such insurer, is

(1) soliciting insurance, or

(2) making, issuing or delivering any contract of insurance, or

(3) collecting or receiving any premium, membership fee, assessment or other consideration for insurance; and a copy of such process and complaint is sent within ten days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last-known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(d) No plaintiff shall be entitled to a judgment by default under this section until the expiration of thirty days from date of the filing of the affidavit of compliance.

(e) Nothing in this section contained shall limit or abridge the right to serve any process, complaint, notice or demand upon any insurer in any other manner now or hereafter permitted by law. L. 1952, c. 330, p. 1054, § 1; L. 1953, c. 17, p. 298, § 190.

17:51-2. Actions against unauthorized insurers; deposit or bond required before insurer may file pleading

(a) Before any insurer not authorized to transact business in this State shall file or cause to be filed any pleading or other paper in any action or proceeding instituted against it, such insurer shall either (1) deposit with the clerk of the court in which such action or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action; *provided, however,* that the court may in its discretion and after reasonable notice to the opposing party and upon a hearing make an order dispensing with such deposit or bond where the insurer shows to the satisfaction of the court that it maintains, in a State of the United States, funds or securities, in trust or otherwise, sufficient and available to satisfy any final judgment which may be entered in such action or proceeding; or (2) procure a certificate of authority to transact the business of insurance in this State.

(b) Nothing in subsection (a) of this section is to be construed to prevent an insurer not authorized to transact business in this State from making a motion for summary judgment, or judgment on the pleadings, or to dismiss the complaint on the ground either (1) that such insurer has not done any of the acts enumerated in subsection (a) of section one, or (2) that the person on whom service was

made pursuant to subsection (c) of section one was not doing any of the acts therein enumerated. L. 1952, c. 330, p. 1056, § 2; L. 1953, c. 17, p. 300, § 191.

17:51-3. Provisions inapplicable, when

The provisions of this act shall not apply to any action or proceeding against any unauthorized insurer arising out of a contract of

(a) Reinsurance effectuated in accordance with the laws of New Jersey;

(b) Insurance effectuated in accordance with chapter four hundred sixty-two of the laws of one thousand nine hundred and forty-eight;

(c) Aircraft insurance;

(d) Insurance on property or operations of railroads engaged in interstate commerce;

(e) Insurance against legal liability arising out of the ownership, operation or maintenance of any property having a permanent situs outside of this State; or

(f) Insurance against loss of or damage to any property having a permanent situs outside this State; where such contract contains a provision designating the commissioner of insurance to be its true and lawful attorney upon whom may be served all lawful process in any action or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract or where the insurer enters a general appearance in any such action or proceeding. L. 1952, c. 330, p. 1057, § 3; L. 1953, c. 17, p. 301, § 192.

17:51-4. Partial invalidity

If any section, subsection, subdivision, paragraph, sentence or clause of this act is held invalid or unconstitutional, such decision shall not affect the remaining portions of this act. L. 1952, c. 330, p. 1058, § 4.

17:51-5. Short title

This act shall be known as the Unauthorized Insurers' Process Act. L. 1952, c. 330, p. 1058, § 5.

APPENDIX J.

Section 1 of the Fourteenth Amendment to the United States Constitution.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1208.

SAFEGUARD MUTUAL INSURANCE COMPANY, an Insurance Corporation of the State of Pennsylvania,

Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, a Body Corporate and Politic of the State of New Jersey and B. SMITH ELECTRIC COMPANY, INC., a Corporation,

Appellees.

On Appeal from the Judgment of the Superior Court of New Jersey, Appellate Division.

MOTION TO DISMISS APPEAL.

BRYAN B. MCKERNAN,
413 Cooper Street,
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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1967.

No. 1208.

SAFEGUARD MUTUAL INSURANCE COMPANY, an Insurance Corporation of the State of Pennsylvania,

Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, a Body Corporate and Politic of the State of New Jersey and B. SMITH ELECTRIC COMPANY, INC., a Corporation,

Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

MOTION TO DISMISS APPEAL.

Appellee, Housing Authority of the City of Camden, moves the Court to dismiss the appeal herein filed, on the following grounds:

I. No substantial Federal question is presented by the appeal that has not previously been decided by this Court.

The question which appellant presents was passed upon by this Court in *International Shoe Co. vs. Washington*, 326 U. S. 310; 90 L. Ed. 95; 66 S. Ct. 154; 161 A. L. R. 1057 and in *McGee vs. International Life Insurance Co.*, 355 U. S. 220; 2 L. Ed. 2d 223; 78 S. Ct. 199.

See also *Parmalee vs. Iowa State Traveling Mens Assn.* (C. A. 5 Fla.), 206 Fed. 2d 518; 44 A. L. R. 2d 410, certification denied 346 U. S. 877; 98 L. Ed. 384; 74 S. Ct. 125.

In the present case appellant, a Pennsylvania Insurance Company, not authorized to do business in New Jersey, issued a surety bond insuring the bid of its principal, B. Smith Electric Co. if the principal was successful in obtaining the award of a contract for electrical work on a public Housing Project to be constructed by the appellee, Housing Authority in the City of Camden. The bid bond was delivered to the Housing Authority in Camden by the principal, who was subsequently awarded the contract, whereupon the bid bond was formally accepted by the Housing Authority as insurance that the principal would enter into the contract so awarded and supply the necessary performance and payment bond required under the contract and by the bidding specifications.

The principal defaulted. It could not supply the required performance and payment bond. It delivered another bond to the Housing Authority from appellant which purported to be a performance and payment bond, but which was rejected because it did not satisfy the requirements of the specifications. Housing Authority, after giving the principal an opportunity to obtain a proper performance and payment bond, was obliged to readvertise and award the bid to another contractor at a higher price, which was in excess of the amount of the bond which is the subject of this litigation. Housing Authority thereupon sued appellant and served the New Jersey Commissioner of Banking and Insurance under the New Jersey Constructive Service Act, N. J. S. A. 17:51-1, subsection (a).

Appellant established the necessary minimum contacts with the State of New Jersey by issuing a surety bond which it knew had no efficacy outside of New Jersey, since the Bond insured the bid of a contractor on a public Housing Project to be built in New Jersey. Appellant gave the bid bond to its principal knowing that the insured was the Housing Authority of the City of Camden. Appellant knew and intended that the bid bond should be delivered to the Housing Authority in Camden, New Jersey, since the very reason for the existence of the bid bond was that it should be submitted with the principal's bid. The place of contracting was New Jersey since the bid bond became a binding contract only upon its acceptance by the Housing Authority and the award of the contract to appellant's principal. All of this occurred in New Jersey since all acts to be done by appellant's principal were to be performed in New Jersey.

The so-called "long arm" statute of Florida, Florida Unauthorized Insurers Process Act, Florida Statutes, Sections 625.28, et seq., F. S. A., construed in *Parmalee vs. Iowa State Traveling Mens Assn.*, supra, was practically identical

with the New Jersey Statute, N. J. S. A. 17:51-1 (Appendix I, Appellant's Jurisdictional Statement, p. 32 et seq.).

Hanson vs. Denckla, 357 U. S. 235, cited by appellant, is inapposite since there was not the "minimum contact" with the state assuming jurisdiction by the defendants over whom jurisdiction was assumed.

For the foregoing reasons, it is respectfully submitted that the appeal filed herein should be dismissed and appellee, Housing Authority of the City of Camden so moves.

Respectfully submitted,

BRYAN B. McKERNAN,
MARTIN F. McKERNAN,
Counsel for Appellee,
Housing Authority of the City of Camden.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

SAFEGUARD MUTUAL INS. CO. *v.* HOUSING AUTHORITY OF CITY OF CAMDEN ET AL.

APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

No. 1208. Decided April 22, 1968.

PER CURIAM:

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.